Supreme Court, U.S.
FILED
SEP 2 1992
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No. 92-274

In The

Supreme Court of the United States

October Term, 1992

SAN VICENTE MEDICAL PARTNERS, LTD.,

Petitioner,

v.

ASHLEY S. ORR, RECEIVER OF AMERICAN PRINCIPALS CORPORATION, a California corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ASHLEY S. ORR, RECEIVER OF AMERICAN PRINCIPALS CORPORATION, IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. In a securities fraud action brought by the Securities and Exchange Commission against a corporate holding company, whose wholly-owned subsidiary acted as the general partner of multiple limited partnerships, does a district court have authority to exercise *quasi in rem* jurisdiction over property of the limited partnerships in a receivership order?

2. When a limited partnership, whose property is subject to a court appointed receiver, and its limited partners have actual notice of a receivership and actively participate in the receivership proceedings, are due process requirements met?

3. Should this Court substitute its judgment for the district court's determination of the reasonableness of the administrative expenses and fees that were charged against the receivership property?

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ASHLEY S. ORR, RECEIVER OF AMERICAN PRINCIPALS CORPORATION, IN OPPOSITION TO PETITION

To: William H. Rehnquist, Chief Justice, and to the Associate Justices of the Supreme Court of the United States.

Respondent, Ashley S. Orr, Receiver of American Principals Corporation, a California corporation, submits this brief in opposition to the petition for a writ of certiorari filed by San Vicente Medical Partners, Ltd.

OPINION BELOW

The published decision of the Ninth Circuit Court of Appeals is reported at 962 F.2d 1402 (9th Cir. 1992) and attached to the petition as appendix "a," at a1-a15. The findings of fact and conclusions of law of the district court are also attached to the petition as appendix "a," at a16-a32. The district court's Order Re Creditor Claim Of Ashley S. Orr and Counterclaim is attached to the petition as appendix "a," at a34-a35.

JURISDICTION

The receiver, Ashley S. Orr, does not disagree with petitioner's statement of jurisdiction.

CONSTITUTION AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution, section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and section 503(b)(3)(E) of the Bankruptcy Code, 11 U.S.C. § 503(b)(3)(E), are involved in this matter and are set forth in the appendix to the petition for a writ of certiorari.

STATEMENT OF THE CASE

On June 7, 1984, in the United States District Court for the Southern District of California, the Securities and

Exchange Commission filed suit against American Principals Holdings, Inc. (hereinafter "APHI"), alleging massive securities law violations. Ashley S. Orr was appointed temporary receiver over APHI.

On June 20, 1984, an Order to Show Cause Why a Permanent Receiver Should Not Be Appointed was served on all investors and creditors of APHI and its subsidiaries. On June 26, 1992, Orr was appointed permanent receiver for "all funds, assets, choses in action and other property belonging to, or in the possession or control of, defendant American Principals Holdings, Inc. ('APHI') and its subsidiaries, excepting Private Ledger Financial Services. . . . "

The district court authorized Orr, as receiver, to "collect and take custody, control, possession and charge of all funds, assets, premises (owned, leased, occupied or otherwise controlled), choses in action and other property of defendant APHI and its subsidiaries excepting Private Ledger." The order appointing Orr permanent receiver also authorized him "to make such payments and disbursements from the funds and assets so taken into custody, control and possession or thereafter received by him, and to incur such expenses and make such agreements as may be necessary and advisable in discharging his duties as permanent receiver. . . . "

The principal property in the possession or control of APHI and its subsidiaries was the eighty-two limited partnerships and trusts that APHI and its subsidiaries had created, syndicated to investors and operated. Petitioner, San Vicente Medical Partners, Ltd. (hereinafter "San Vicente") was one of the eighty-two partnerships.

San Vicente was formed for the purpose of developing, constructing and operating a medical office building in Los Angeles. The syndicator and general partner of San Vicente was American Principals Corporation (hereinafter "APC"), a wholly-owned corporate subsidiary of APHI.

During the receivership, Orr administered the properties in his control and made interim reports, recommendations and accountings to the district court. These reports were served on all interested parties, including creditors, investors in each of the limited partnerships and trusts. The first report of the receiver and petition for instructions was filed and served on August 27, 1984. The second report followed approximately eight months later.

In the months after his appointment, Orr was forced to take action to raise funds for, and protect the assets of, the San Vicente partnership. Investors in the partnership had stopped making payments under promissory notes they had given San Vicente in connection with their investment.

On October 19, 1984, Orr petitioned the court for instructions regarding the delinquent note obligations of multiple San Vicente investors. Members of the San Vicente partnership filed objections to the receiver's request for instructions. On November 13, 1984, other limited partners in San Vicente appeared in the district court and requested relief from the court in connection with the collection of delinquent sums owed to the San Vicente partnership. From the receivership's inception,

the Kenney family of investors in San Vicente participated in the receivership proceedings and submitted multiple pleadings to the court.

The second report of the receiver was filed on April 26, 1985. This was also served on all investors in the partnerships and trusts. In Orr's report, the receiver concluded that there had been massive commingling among the partnerships and misuse of investor funds. Orr stated that each limited partnership was subject to equitable claims of investors from other limited partnerships and trusts and that their funds were commingled and used to acquire or maintain assets unrelated to the partnership in which they invested. Orr recommended that the assets and liabilities of the partnerships be treated on a consolidated basis for purposes of handling creditor and investor claims. The receiver's report was accompanied by notice of a hearing on the receiver's proposed plan of consolidation.

On May 13, 1985, San Vicente limited partners filed an opposition to the receiver's proposed plan of consolidation and claims administration. The Kenney limited partners in San Vicente also filed separate objections to the receiver's proposal for consolidation.

On June 14, 1985, the district court denied the receiver's request for consolidation. At that time and at the request of the San Vicente limited partners, the lower court "spun-off" San Vicente from the receivership estate. The partnership was out from under the protective cloak of the receivership for only eight months when it sought the protection of the bankruptcy court.

On February 14, 1986, San Vicente voluntarily filed a chapter 11 bankruptcy petition in the southern district of California. Orr filed a proof of claim in the bankruptcy court, asserting a priority administrative claim as an expense of administration. Orr's claim was filed pursuant to 11 U.S.C. §§ 543(c)(2) and 503(b)(3)(E). On June 24, 1987, San Vicente filed an adversary action objecting to the receiver's claim and asserting a counterclaim.

While Orr's claim was pending before the bankruptcy court, counsel for San Vicente and Orr stipulated that the receiver's claim could be heard by the district court or anyone the district court judge decided should hear the matter. The same day the district court approved the stipulation, an order referring Orr's claim for expenses and fees to the magistrate's court was entered. On June 29, 1987, two months after the assignment to the magistrate, San Vicente sought to remove the reference to the magistrate.

After an evidentiary hearing before the magistrate on the receiver's claim for fees and San Vicente's counterclaim, the magistrate issued his order awarding administrative fees and costs to the receiver. San Vicente appealed from this order arguing that it had not consented to a trial before a magistrate. The Ninth Circuit concluded that the stipulation between the parties was not a "clear and unambiguous" consent to trial before a magistrate and remanded the matter to the district court for further proceedings. *See In re San Vicente Medical Partners, Ltd.*, 865 F.2d 1128 (9th Cir. 1989).

On June 29, 1989, a trial *de novo* was held before United States District Court Judge Leland C. Nielsen on

the receiver's claim for an award of administrative fees and costs and San Vicente's counterclaim. Judge Nielsen entered his findings of fact and conclusions of law on December 21, 1989.

The court concluded that the receiver was entitled to recover $425,878.00 from the assets of San Vicente, and San Vicente was entitled to $118,400.91 on its counterclaim. The court directed that judgment be entered in favor of the receiver for $307,477.09.[1]

San Vicente appealed. On May 4, 1992, the judgment of the district court was affirmed by the Ninth Circuit Court of Appeals.

SUPPLEMENTAL STATEMENT OF FACTS

At the time Orr was appointed receiver, "there was an urgent need to provide management for the partnerships controlled by APHI." *In re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402, 1404 (9th Cir. 1992), *petition for cert. filed*, (August 3, 1992). The APHI receivership began with "massive administrative, legal and accounting problems." *In re San Vicente Medical Partners, Ltd.*, No. CV-84-1383N(M), slip opinion (S.D. Cal. Dec. 20, 1989), App. ¶ 35, at a24.

> Substantial time and labor was required to organize and administer the Estate, handle legal

[1] Although the district court ordered the clerk to enter a net judgment in favor of the receiver in the amount of $305,477.09, this appears to be a mathematical error, and the judgment amount should be $307,477.09.

> problems created by prior management as well as those related to administration of the Estate, and begin to assemble a coherent accounting system.

Id., App. ¶ 35, at a24.

In June of 1984, when Orr assumed his position as receiver, the San Vicente building was about forty-one percent (41%) completed. The shell had been constructed, a substantial portion of the outer skin of the building was in place, and the interior was incomplete. Contractors were owed money; prior management had been forced to resign; the building leasing program was ineffective; proposed rentals were over market because costs exceeded budget; and the limited partners were upset about the SEC action and the future of their investment.

When the APHI receivership was created, San Vicente was included as part of the estate. The district court authorized the receiver to take "such action as is necessary and appropriate to prevent the dissipation, concealment or disposition of any assets excepting Private Ledger. . . ." Mr. Orr was directed to "take such action as is necessary and appropriate for the preservation of any assets excepting Private Ledger. . . ." Finally, in the order appointing a permanent receiver, Orr was authorized to incur necessary expenses.

> [The receiver was ordered] to make such payments and disbursements from the funds and assets so taken into custody, control and possession or thereafter received by him, and to incur such expenses and make such agreements as may be necessary and advisable in discharging his duties as permanent receiver, to employ

> persons to operate the entities in receivership. . . .

While San Vicente was part of the receivership, Orr devoted more time to San Vicente than to any other partnership or problem facing him. At the time the receiver was appointed, the building was only 41% completed. Investors in San Vicente had stopped making note payments to the partnership, and the receiver had to take steps to collect amounts due. He continued to employ C.A. Workman, an employee of APHI, to help supervise the project. Workman spent approximately 90% of his time on the building. Tom Scheuneman acted as president of APHI during this period. He also reported to the receiver. During this period of the receivership, approximately 25% of Mr. Scheuneman's time was spent on problems confronting the San Vicente partnership. In addition, the receiver's staff spent enormous amounts of time handling the problems facing this partnership. San Vicente incorrectly claims that the services of other personnel were paid for directly from funds of the partnership. The evidence was to the contrary.

Because of the appointment of a receiver, Orr, Workman and Scheuneman were concerned that the construction lender, Bell Savings, might declare the loan to San Vicente in default. Steps were taken, at the receiver's direction, to reassure the lender. At the same time, there was a concern that the general contractor would halt work on the project because of his fear of nonpayment. Orr, who was personally acquainted with the general contractor, intervened and gave the contractor enough confidence to proceed with the building.

When San Vicente was spun out of the receivership, its medical office building had been completed. The investors in San Vicente had a building as an asset, while many investors in other partnerships were not as fortunate. The building was subsequently valued by San Vicente at between $18-$20 million.

San Vicente was turned over to a new general partner on June 14, 1985. The construction loan the partnership had obtained for the building matured on October 1, 1985, three and one-half months later. The new general partner was unable to reschedule the construction loan, so San Vicente filed for bankruptcy on February 14, 1986. In September of 1986, the building was sold for $18,250,000.00. The lender discounted its construction loan to $14,500,000.00. San Vicente received approximately $3,690,000.00 from the sale.[2] The claim of the receiver for expenses of $425,878.00 is a claim against the sale proceeds.

During the course of the APHI receivership, the estate had been funded from multiple sources, including the assessment of the individual partnerships the receiver

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[2] San Vicente ignores the $3,690,000.00 net proceeds it received from the sale and gives the impression that it received no benefit from the receiver's actions. While it may be true that APC, which the receiver replaced, expended excessive sums of money to develop the building, the actions of APC are not attributable to the court-appointed receiver. Finally, San Vicente's reference to a June, 1985 valuation by the receiver does not establish that the partnership did not benefit from the receivership. That valuation was for the purpose of determining whether San Vicente investors should participate in distributions from a related class action.

was appointed to manage and protect. Most of the eighty-two partnerships paid the full amount of their *pro rata* share of the expenses of the receivership. Many paid a portion of the amounts due the receivership, and some paid more than their proportionate share. Many of the partnerships voluntarily agreed to pay their share of allocated and unallocated expenses.

San Vicente, on the other hand, is the only partnership that refused to pay its share of expenses, requiring a trial. Yet, the receivership completed the construction of the eleven (11) story medical office building which sold for $18 million and netted $3.69 million to this limited partnership. San Vicente received the benefits of the receivership without paying its share of the expenses of the estate.

At the trial, Orr asserted a claim for expenses of $512,122.00, which was greater than the amount of the proof of claim filed in the San Vicente bankruptcy proceeding. The proof of claim was for $425,878.00. The district court limited Orr's claim to $425,878.00, concluding that the attempt to seek a greater sum was untimely.

The receiver's claim for $425,878.00 was made up of San Vicente's proportionate share of the receiver's unallocable expenses and accounting expenses Orr paid to Kenneth Leventhal & Company, the receiver's retained accounting firm, which were incurred specifically for San Vicente. The actual figures were higher. The revised figures, introduced in the district court, showed that San Vicente's proportionate share of unallocable expenses

was $342,238.00, and the expenses allocable to San Vicente totaled $169,885.00. Claims for the unreimbursed time of the receiver and his staff were also made.

The award was requested by the receivership estate – not by Orr personally. The sum awarded does not go to Orr but reimburses the receivership for past obligations incurred during the administration of the receivership. Without an award of fees and costs from the assets of San Vicente, the partnership will not have paid its fair share of allocable and unallocable expenses incurred while San Vicente was part of the receivership. The court considered many factors in making its award to the receiver. The investors in San Vicente had expressly agreed to pay fees totalling $3,426,500.00 for the construction of the medical office building.[3] From the efforts of the receivership and related litigation, the San Vicente investors, as well as investors in other partnerships, will recover 80 to 85% of their investment.

The district court concluded that "the administrative fee requested by Orr of $425,878.00 in the Proof of Claim filed in San Vicente's bankruptcy proceeding is reasonable in light of the amount at stake, the risks involved, and the efforts expended on behalf of the SVMP partnership." The court also found the amount fair, reasonable and typical of sums paid for comparable work. Against this amount, the court awarded San Vicente $118,400.91 on its counterclaims. As a result, the court awarded Orr the net sum of $307,477.09. If San Vicente does not pay its

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[3] In its findings, the court refers to $2,426,500.00, instead of $3,426,500.00. This appears to be a typographical error. In any event, PX 10 supports the larger figure.

share of expenses, its investors will receive a windfall at the expense of other less fortunate APHI creditors and investors.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari does not meet the standard for review by the Court. Under rule 10 of the Supreme Court Rules, this Court grants certiorari "only when there are special and important reasons therefor." This case does not call for Supreme Court review for several reasons.

I.

A RECEIVER'S EXERCISE OF *QUASI IN REM* JURISDICTION OVER THE PROPERTY OF A RELATED ENTITY IN A SECURITIES ACTION DOES NOT RAISE AN UNSETTLED QUESTION OF LAW.

San Vicente confuses jurisdiction over a nonparty with *quasi in rem* jurisdiction over property which is closely related to the securities action, receivership and the receiver's claim for expenses. For this reason, *Finley v. United States*, 490 U.S. 545, 548-49 (1989), and other pendent party cases cited by San Vicente are inapposite.

This case does not raise an unsettled question of law. Even *Finley* acknowledges that "ancillary" jurisdiction exists over claims involving parties over whom there is no independent basis for jurisdiction. *Id.* at 549-50. "[A]n additional party [with] a claim upon contested assets within the court's exclusive control" is an example of

ancillary jurisdiction approved in *Finley*. *Id.*, at 549, citing *Krippendorf v. Hyde*, 110 U.S. 276 (1884).

Receivers have broad powers. For example, section 754 of Title 28 gives a receiver complete jurisdiction over property located in other districts. The section provides, in relevant part, as follows:

> A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

28 U.S.C. § 754 (West 1968). The receiver's exercise of control over property of San Vicente is consistent with existing statutes and case law.

At the time Orr was appointed, the lower court was confronted with a case where management of the APHI-related entities had been forced to resign, and massive fraud upon the public had been perpetrated. Under these circumstances, courts need broad authority to deal with the complexities of a fraud-plagued investment empire.

> The basis for broad deference to the district court's supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions.
>
> . . . .
>
> [W]e have acknowledged that a primary purpose of equity receiverships is to promote orderly and efficient administration of the estate

> by the district court for the benefit of creditors. [Citations omitted.]

S.E.C. v. Hardy, 803 F.2d 1034, 1037-38 (9th Cir. 1986).

A receiver was appointed in this civil action at the request of the Securities and Exchange Commission. The complaint filed by the Commission identified APHI as a holding company for numerous affiliated entities. APHI was alleged to own and control APC, the real estate and research and development syndicator, and four other corporations which acted as managing general partners for the limited partnerships they syndicated. APHI, through a network of subsidiaries, was alleged to have sold limited partnership interests to at least 2,500 investors nationwide for over $70 million.

The offering memoranda distributed to investors represented that each limited partnership would purchase a specific asset. The SEC alleged that "some of the partnerships failed to acquire their assets when stated and, in at least one case, failed to acquire the asset at all." General partners were alleged to have used partnership funds "to meet their own cash needs and the cash needs of other partnerships." Investors were not told that their funds were commingled with funds from other partnerships. The ability to carry on existing partnerships depended upon the influx of new investors into new partnerships. Faced with these allegations, the district court ordered the appointment of a receiver with broad powers to collect and preserve the assets of the partnership entities.

In this type of case, the SEC is concerned with "the protection of those who already have been injured by a

violator's actions from further despoliation of their property or rights." *Esbitt v. Dutch-American Mercantile Corp.*, 335 F.2d 141, 143 (2d Cir. 1964), *quoting*, *S.E.C. v. H.S. Simmons & Co.*, 190 F.Supp. 432, 433 (S.D.N.Y. 1961). Federal courts have wide latitude in fashioning protective measures.

> The federal courts have inherent equitable authority to issue a variety of "ancillary relief" measures in actions brought by the SEC to enforce the federal securities laws. This circuit has repeatedly approved imposition of a receivership in appropriate circumstances. The power of a district court to impose a receivership or grant other forms of ancillary relief does not in the first instance depend on a statutory grant of power from the securities laws. Rather, the authority derives from the inherent power of a court of equity to fashion effective relief.

S.E.C. v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) (footnotes omitted). The receiver has broad authority to protect the receivership *res* and defrauded investors. *S.E.C. v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985).

In *Wencke*, 622 F.2d at 1369, the Ninth Circuit concluded that the district court had power to stay nonparties from taking action against the entities in the receivership. The courts have exercised their equitable powers to impound assets where necessary to effectuate the purposes of the securities laws. *S.E.C. v. American Board of Trade, Inc.*, 830 F.2d 431, 438 (2d Cir. 1987), *cert. denied*, 485 U.S. 938 (1988). The court has authority to direct the receiver to marshall the assets of the entity in the receivership. *Esbitt v. Dutch-American Mercantile Corp.*, 335 F.2d at 143.

In actions under the securities laws, courts with custody of property have exclusive jurisdiction to proceed and must control the property of the receivership to effectuate their jurisdiction. *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 65 (2d Cir. 1965). San Vicente was made part of the APHI receivership to accomplish the objectives of the securities laws. This was consistent with existing statutes, case law and due process.

II.

THE COURT'S ASSERTION OF *QUASI IN REM* JURISDICTION WAS CONSISTENT WITH EXISTING CASE LAW AND DID NOT DEPRIVE SAN VICENTE OF DUE PROCESS OF LAW.

In this case, the inclusion of San Vicente as part of the receivership estate and the adjudication of the receiver's claim for fees did not deny San Vicente due process of law. In affirming the district court, the Ninth Circuit concluded:

> [A] district court has the power to include the property of a non-party limited partnership in an SEC receivership order as long as the non-party meets the minimum contacts standard set out in *International Shoe* and receives actual notice and an opportunity for a hearing.

In re San Vicente Medical Partners, Ltd., 962 F.2d at 1408; *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984).

Shaffer v. Heitner, 433 U.S. 186 (1977), provides some useful guidelines for analyzing the district court's exercise of jurisdiction. In *Shaffer*, the Supreme Court applied

the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to *quasi in rem* jurisdiction. The *Shaffer* Court noted: "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation." *Shaffer v. Heitner*, 433 U.S. at 207. However, in *Shaffer*, the property was not the subject of the litigation and was unrelated to the underlying causes of action against the nonresidents. *Id.* at 213. For these reasons, the presence of property itself was insufficient to support the state court's exercise of jurisdiction over the nonresidents.

Although the guidelines in *Shaffer* were directed at the exercise of state court *quasi in rem* jurisdiction, the minimum contacts standard described in that case is met here. San Vicente is a California limited partnership with its principal place of business in California. In addition, San Vicente and its property (a Los Angeles construction project) was controlled by APC, the wholly-owned subsidiary of defendant APHI, over which the district court had jurisdiction. The San Vicente partnership property was intimately related to the SEC action, the receiver's claim for reimbursement of expenses and fees and San Vicente's counterclaim against the receiver. For all these reasons, the exercise of jurisdiction over San Vicente satisfies the *International Shoe* standard. *See Shaffer v. Heitner*, 403 U.S. at 209.

In addition, the district court's exercise of jurisdiction over San Vicente's property was consistent with "traditional notions of fair play and substantial justice." *Asahi Metal Industrial Co. v. Superior Court*, 480 U.S. 102, 113

(1987). "The burden on San Vicente of litigating in California is not severe; in fact, no other forum would be more convenient for San Vicente." *In re San Vicente Medical Partners, Ltd.*, 962 F.2d at 1407.

Although San Vicente complains that its property was initially included as a part of the receivership in a summary fashion, summary proceedings are appropriate and proper to protect the assets of an equity receivership. *See Bien v. Robinson*, 208 U.S. 423, 428 (1908). In any event, the inclusion of San Vicente as a part of the receivership was not an ultimate resolution of claims adverse to the property. The receiver's claim for expenses and fees was determined in the context of the bankruptcy proceeding *initiated by San Vicente*. The district court's assertion of *quasi in rem* jurisdiction over San Vicente's property did not deprive the partnership of due process.

1. The Partners In San Vicente Had Actual Notice Of The Receivership Proceedings And Participated In The Litigation.

San Vicente limited partners actively participated in the receivership proceedings. Under these facts, the failure to name the partnership as a party to the SEC action did not deny the partnership due process of law. The requirements for due process vary with the circumstances.

> [T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." [Citation omitted].

Goss v. Lopez, 419 U.S. 565, 578 (1975). Due process requires notice and an opportunity for a hearing. *Id.* at 579. Here, San Vicente had both.

San Vicente does not deny that its general partner had notice of the receivership proceedings. APC had notice of the application to appoint a permanent receiver and had an opportunity to be heard. Notice to APC was notice to the limited partnership. Cal. Corp. Code § 15012 (West 1991). Contrary to San Vicente's assertion, imputing notice of a request for the appointment of a receiver is not the equivalent of imputing notice of fraud through notice to the defrauding partner.

Nevertheless, San Vicente limited partners had actual notice of the receivership proceedings. They were served with multiple filings during the time San Vicente was part of the receivership estate. Among the items served on the limited partners was the June 20, 1984 Order To Show Cause Why A Permanent Receiver Should Not Be Appointed. In addition, various partners in San Vicente filed pleadings in the receivership action during the twelve months San Vicente was part of the APHI receivership. This is further evidence that San Vicente had notice of the proceedings, participated in the action and had ample opportunities for a hearing. San Vicente admits that it received actual notice of the receiver's proposal to consolidate San Vicente property with the property of other limited partnerships. San Vicente limited partners actively opposed that request.

The timing and type of hearing required to satisfy due process concerns will vary depending upon the circumstances. The hearing may not even be required before

a preliminary deprivation of a property interest. *See Arnett v. Kennedy*, 416 U.S. 134, 167 (1974), *reh'g denied*, 417 U.S. 977 (1974) (concurring opinion). In this case, the inclusion of San Vicente in the receivership did not deprive the partnership of its property. Moreover, there was no resolution of claims adverse to San Vicente during the receivership proceedings. In fact, the judgment against the partnership arose out of the bankruptcy, which San Vicente initiated.

San Vicente filed for protection under the bankruptcy laws on February 14, 1986. The receiver filed his administrative claim against the estate. Pursuant to a stipulation between San Vicente and Orr, the receiver's claim for expenses and San Vicente's counterclaim were tried before the district court.

San Vicente received notice of proceedings in the APHI receivership throughout the year it was a part of the receivership. San Vicente participated in the action, although it was not a named party. The partnership was sufficiently involved in the receivership action to satisfy due process requirements. *United States v. Arizona Fuels Corp.*, 739 F.2d at 459.

Finally, the claim against it for administrative expenses and fees was heard in the context of the bankruptcy proceeding which San Vicente voluntarily filed. There was no due process violation here.

III.

THE REASONABLENESS OF THE EXPENSES AND FEES AWARDED TO THE RECEIVER IS A MATTER OF DISCRETION, WHICH IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

San Vicente complains of the amount of the award to the receiver. In this instance, Orr was awarded $425,878.00 as expenses and fees which should be reimbursed from the assets of San Vicente. Against this sum, the court applied a credit of $118,400.91, which it awarded to San Vicente on its counterclaim. The net award to the receiver was $307,477.09.

In spite of evidence to the contrary, San Vicente incorrectly views the court's award as a multiplier of the receiver's time. The award consisted of receivership expenses and fees of the receiver and his staff, which were incurred for the benefit of San Vicente and not paid.

The district court's award was not for Mr. Orr, personally. Instead, it was a request for reimbursement of the receivership. The award was reasonable under standards applicable to compensation of a superseded custodian under the Bankruptcy Code and to an equity receiver under the federal securities laws.

"The award of receivership fees in an SEC action is analogous to the award of receivership fees in bankruptcy proceedings. . . . " *In re San Vicente Medical Partners, Ltd.*, 962 F.2d at 1409. These awards are reviewed for an abuse of discretion. *See Southwestern Media, Inc. v. Rau*, 708 F.2d 419, 422 (9th Cir. 1983).

Under section 503(b)(3)(E) of title 11, Orr was entitled to recover as an administrative claim "actual, necessary expenses . . . incurred by a custodian superseded under section 543 . . . , and compensation for the services of such custodian. . . . " 11 U.S.C. § 503(b)(3)(E) (West 1979). The standard for compensating custodians is the normal rate charged for comparable services. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 657-59 (9th Cir. 1985).

Here, the San Vicente investors had agreed that fees totaling $3,426,500.00 for the construction of the eleven story medical building was proper. The building was 41% completed when the receiver took over the project. Orr and his staff performed 59% of the work for only $425,878.00, approximately twelve percent (12%) of the fee the investors anticipated paying. The award to the receiver was reasonable.

Alternatively, the trial court computed the award using the factors applied to awarding fees to professionals in bankruptcy proceedings. Under this analysis, the award is reasonable.

The award to the receiver is a pro rata share of unallocated expenses and includes reimbursement for the time and effort spent by Orr and his staff managing San Vicente and ensuring that its medical building was completed. The trial court's exercise of its discretion and the reasonableness of expenses and fees awarded to the receiver is not a subject for review by this Court.

CONCLUSION

The petitioner has not raised any issue that merits a grant of certiorari. Accordingly, this Court should deny the petition for a writ of certiorari.

Dated: September 2, 1992

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